Oriental Bank Bhd v Uniphoenix Corp Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D4–22–460 OF 1998
ABDUL MALIK ISHAK J
1 AUGUST 2005

Civil Procedure — Summary judgment — Triable issues — Overdraft facilities — Demand for arrears of repayment — Whether two conditions precedent stated in letter of offer were not complied with — Whether there was no notice of change of base lending rate — Whether there was wrongful recall of facility — Whether there existed a collateral agreement wherein it was agreed that an interest rate of 1.25% will be charged as opposed to 2.25% that was charged and demanded by plaintiff — Whether imposition of penalty interest contravened s 75 of the Contracts Act 1950 — Whether there was no loss to plaintiff — Contracts Act 1950 s 75

The plaintiff agreed to grant a term loan of RM15 million to the defendant with interest thereon calculated at the rate of 2.25% per annum above the plaintiff's base lending rate (BLR) of 9% per annum. The term loan was fully drawn down and released by the plaintiff to the defendant. The defendant defaulted in the repayments of the term loan. As a result the plaintiff demanded the arrears of the repayment. The senior assistant registrar allowed the plaintiff's application for summary judgment under O 14 of the Rules of the High Court 1980 ('RHC'). The defendant appealed to the High Court. The defendant raised six issues and the defendant said that they were triable issues. There were: (1) the two conditions precedent as stated in the letter of offer were not complied with; (2) no notice of the change of the BLR was given to the defendant; (3) there was a wrongful recall of the facility; (4) there was in existence a collateral agreement wherein it was agreed that an interest rate of 1.25% will be charged as opposed to 2.25% that was charged and demanded by the plaintiff; (5) the imposition of the penalty interest contravened s 75 of the Contracts Act 1950; and (6) since the facility was recalled shortly after being disbursed, there was no loss to the plaintiff.

Held, dismissing the appeal:

(1) The fact that the plaintiff did not affirm an affidavit in reply in regard to the issue of compliance with the conditions precedent should not be deemed to mean that the conditions precedent have not been complied with. The letter of offer and the facility agreement categorically specified that prior to the release and the draw down of the RM15 million term loan facility to the defendant the said conditions precedent had to be complied with. It was an implied term which had been accepted in the banking practice that the plaintiff as an established bank would only release the term loan upon compliance of the conditions precedent (see para 15).

(2) The onus of proving whether the conditions precedent had been complied with lied with the defendant by virtue of s 106 of the Evidence Act 1950. It was well within the knowledge of the defendant whether the conditions precedent had been complied. All the documents produced by the plaintiff strongly and firmly proved the contractual liability on the part of the defendant to pay the outstanding debt to the plaintiff. The defendant too did not dispute these documents nor denied the existence of these documents. The defendant saw it fit not to challenge the legality of these documents nor raised defences in order to dispute the documents in its statement of defence and in its affidavit. All these must be construed adversely against the defendant (see paras 19 and 22).

(3) Section 6.03 of the facility agreement imposed no contractual obligation on the part of the plaintiff to inform the defendant of the changes of the BLR. The defendant's allegation that the plaintiff had changed the BLR according to the whims and fancies of the plaintiff was a mere bare allegation bearing in mind that it was an implied term to the facility agreement that the changes of the BLR was determined solely by the Central Bank of Malaysia. It would be against business efficacy to impose a duty of care onto the plaintiff as a bank to inform its clients as to the changes of the BLR since changes in the BLR happen on a daily basis. Moreover, the defendant knew about the changes of the BLR because it was clearly stated in the loan statement issued by the plaintiff. Despite this knowledge, the defendant remained silent and did not raise this issue prior to the legal proceeding instituted by the plaintiff (see para 25).

(4) The recall of the loan facility was done rightly in accordance to article 12 of the facility agreement and the undisputed evidence annexed to the plaintiff's supporting affidavit had been produced by the plaintiff to categorically show that the recall of the loan facility was rightly done (see para 26).

(5) It was an outright bare assertion to say that there was in existence a collateral agreement pertaining to the rate of interest at 1.25% that would be charged as opposed to the interest of 2.25% that was charged and demanded. It was an assertion that lacked precision or was inconsistent with the undisputed contemporary documents (see para 25).

(6) The right of the plaintiff to impose a penalty interest on the defendant was an absolute contractual right pursuant to s 6.04 of the facility agreement that had been duly entered into by the defendant. The defendant was contractually bound to honour the said term and it must be estopped from denying the same (see para 41).

(7) Depending on the circumstances of the case, the penalty interest might or might not be a penalty. In this case, the plaintiff was only claiming the penalty interest at the rate of 1% per annum. It was not exhorbitant and it was not caught by s 75 of the Contracts Act 1950 (see para 41).

(8) The recall of the facility was rightly done in accordance with s 12 of the facility agreement. The very fact that the loan facility had been released and draw down by the defendant and the recall was made constituted proof that the plaintiff had suffered losses and the certificate of indebtedness stood as *prima facie* proof as to the amount of losses suffered by the plaintiff. Consequently, it was wrong to say that the plaintiff had not suffered any loss because of the recall of the loan facility (see para 42).

[**Bahasa Malaysia summary**

Plaintif bersetuju memberikan pinjaman berjangka sebanyak RM15 juta kepada defendan dengan faedah pada kadar 2.25% setahun di atas kadar pinjaman asas plaintif (BLR) 9% setahun. Pinjaman berjangka telah dikeluarkan dan diberikan sepenuhnya oleh plaintif kepada defendan. Defendan ingkar membayar pinjaman berjangka tersebut. Oleh yang demikian plaintif menuntut pembayaran tunggakan yang belum dibayar. Penolong kanan pendaftar membenarkan permohonan plaintif untuk penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Defendan merayu keMahkamah Tinggi. Defendan membangkitkan enam isu dan defendan mengatakan yang ia mempunyai isu-isu yang boleh dibicarakan. Ianya ialah: (1) dua prasyarat seperti yang dinyatakan di dalam surat tawaran telah tidak dipatuhi; (2) tiada notis berhubung dengan pertukaran BLR diberikan kepada defendan; (3) terdapat pemanggilan kembali yang salah berhubung dengan kemudahan tersebut; (4) terdapat perjanjian kolateral di mana ianya telah dipersetujui yang kadar faedah sebanyak 1.25% akan dikenakan dan bukannya 2.25% sebagaimana yang dicajkan dan dituntut oleh plaintif; (5) pengenaan faedah penalti bertentangan dengan s 75 Akta Kontrak 1950; dan (6) oleh kerana kemudahan tersebut dipanggil kembali sejurus selepas ianya dikeluarkan, tiada kerugian ditanggung plaintif.

Diputuskan, menolak rayuan tersebut:

(1) Fakta yang plaintif tidak mengesahkan satu afidavit jawapan berhubung dengan isu kepatuhan prasyarat-prasyarat tidak akan dianggap bermaksud yang prasyarat-prasyarat tersebut telah tidak dipatuhi. Surat tawaran dan perjanjian kemudahan tersebut secara khusus menyatakan bahawa sebelum pengeluaran kemudahan pinjaman berjangka sebanyak RM15 juta dibuat kepada defendan, prasyarat-prasyarat tersebut hendaklah dipatuhi. Ianya merupakan terma tersirat yang diterima pakai oleh amalan

perbankan bahawa plaintif sebagai sebuah bank yang telah bertapak akan hanya melepaskan pinjaman berjangka setelah kesemua prasyarat dipatuhi (lihat perenggan 15).

(2) Tanggungjawab membukti sama ada prasyarat-prasyarat tersebut telah dipatuhi terletak pada defendan mengikut s 106 Akta Keterangan 1950. Ianya dalam rangkuman pengetahuan defendan sama ada prasyarat-prasyarat tersebut telah dipatuhi. Kesemua dokumen yang dikemukakan oleh plaintif jelas menunjukkan terdapat tanggungjawab kontrak pada pihak defendan untuk membayar hutang tertunggak itu kepada plaintif. Defendan tidak menyangkal dokumen-dokumen tersebut ataupun menafikan kewujudan dokumen-dokumen itu. Defendan tidak fikir kesahan dokumen-dokumen ini patut disangkal atau untuk membangkitkan pembelaan untuk mempertikaikan dokumen-dokumen di dalam pernyataan pembelaannya dan juga di dalam afidavitnya. Kesemua ini mesti ditafsirkan secara negatif terhadap defendan (lihat perenggan 19 dan 22).

(3) Seksyen 6.03 perjanjian kemudahan tersebut tidak mengenakan sebarang kewajipan kontrak ke atas plaintif untuk memberitahu defendan mengenai pertukaran BLR. Dakwaan-dakwaan defendan yang plaintif telah menukarkan BLR secara sesuka hati adalah hanya dakwaan semata, perlu juga diingatkan ianya adalah satu terma tersirat yang pertukaran BLR diputuskan secara mutlak oleh Bank Negara Malaysia. Ianya akan bertentangan kelancaran perniagaan untuk mengenakan kewajipan berjaga-jaga ke atas plaintif sebagai sebuah bank untuk memberitahu pelanggan-pelanggannya mengenai pertukaran BLR kerana pertukaran BLR berlaku setiap hari. Tambahan pula, defendan mengetahui mengenai pertukaran BLR kerana ianya dinyatakan dengan jelas pada penyata pinjaman yang dikeluarkan oleh plaintif. Walaupun dengan pengetahuan ini, defendan tetap diam dan tidak membangkitkan sebarang isu sebelum prosiding undang-undang ini dimulakan oleh plaintif (lihat perenggan 25).

(4) Panggilan semula kemudahan pinjaman tersebut telah dibuat secara teratur mengikut artikel 12 perjanjian kemudahan dan keterangan yang tidak disangkal dalam afidavit sokongan yang telah dikemukakan oleh plaintif yang secara khusus menunjukkan bahawa panggilan semula kemudahan pinjaman itu telah dibuat secara teratur (lihat perenggan 26).

(5) Ianya merupakan dakwaan semata untuk menyatakan bahawa terdapat perjanjian kolateral berhubung dengan kadar faedah 1.25% yang patut dicaj dan bukannya 2.25% sebagaimana yang dicaj dan dituntut itu. Ianya merupakan dakwaan yang tidak tepat atau tidak konsisten dengan dokumen-dokumen semasa yang tidak disangkal itu (lihat perenggan 25).

(6) Hak plaintif untuk mengenakan faedah penalti ke atas defendan adalah hak mutlak kontrak di bawah s 6.04 perjanjian kemudahan yang telah

dimasuki oleh defendan. Defendan telah terikat secara kontrak untuk meluhurkan terma tersebut dan ia mesti diestop dari menafikannya (lihat perenggan 41).

(7) Bergantung kepada keadaan-keadaan kes, faedah penalti mungkin bukan satu penalti. Dalam kes semasa, plaintif hanya menuntut faedah penalti pada kadar 1% setahun. Ianya tidak terlampau tinggi dan tidak tertakluk kepada s 75 Akta Kontrak 1950 (lihat perenggan 41).

(8) Panggilan semula kemudahan ini telah dibuat secara teratur mengikut s12 perjanjian kemudahan tersebut. Fakta yang kemudahan pinjaman ini telah dikeluarkan oleh defendan dan panggilan semula dibuat menjadi bukti bahawa plaintif mengalami kerugian dan sijil keberhutangan menjadi bukti *prima facie* berhubung dengan jumlah kerugian yang ditanggung oleh plaintif. Dari itu, ianya adalah tidak betul untuk mengatakan yang plaintif tidak menanggung sebarang kerugian kerana panggilan semula kemudahan pinjaman tersebut (lihat perenggan 42).]

Notes

For cases on triable issues, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 6103–6173.

Cases referred to

Anglo-Italian Bank v Wells; Anglo-Italian Bank v Davies (1878) 38 LT 197 (refd)
Augustien v Challis (1847) 1 Exch 279 (refd)
Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (refd)
Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)
BP Refinery (Westernport) Pty Ltd v Shire of Hastings Ltd [1978] ALJR 20 (refd)
Charnock v Liverpool Corp [1968] 1 WLR 1498 (refd)
City and Westminster Properties Ltd v Mudd [1959] Ch 129 (refd)
Crump v Cavendish 5 Ex D 211 (refd)
Dane v Mortgage Ins Corp [1894] 1 QB 54 (refd)
Edwards v Davis 4 TLR 385 (refd)
European Partners in Capital (EPIC) Holdings BV v Goddard and Smith (1992) 41 EG 118 (refd)
Harrison v Bottenheim (1872) 26 WR 362 (refd)
Heilbut, Symons & Co v Buckleton [1913] AC 30 (refd)
Interfinance Bhd v Liew Ek Chiu [1993] 2 CLJ 644 (refd)
J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd [1976] 2 All ER 930 (refd)
JJ Savage & Sons Pty Ltd v Blakeney (1970) 119 CLR 435 (refd)
Kim Seng Hotel & Coffee Shop v Chuah Teong Buan [1971] 1 MLJ 233 (refd)
Malik v BCCI [1997] 3 All ER 1 (refd)
Nassau Steam Press v Tyler 70 LT 376 (refd)
National Bank of Greece SA v Pinios Shipping Co (No 1) & Anor; The Maira [1990] 1 All ER 78 (refd)

National Co for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)
Pacific Bank Bhd, The v Chong Wai Hiong [1989] 2 CLJ 509 (refd)
Perbadanan Pembangunan Ekonomi Sarawak v Sarawak Motor Industries Bhd [1989] 3 MLJ 246 (refd)
Perwira Habib Bank Malaysia Bhd v Lim Hong Tatt [1989] 1 MLJ 263 (refd)
Realvest Properties Sdn Bhd v Co-operative Central Bank Bhd (In receivership) [1996] 2 MLJ 461 (refd)
Record v Bell [1991] 1 WLR 853 (refd)
Roberts v Plant [1895] 1 QB 597 (refd)
Robinson & Co v Lynes [1894] 2 QB 577 (refd)
Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 MLJ 151 (refd)
Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee) [1998] 4 MLJ 651 (refd)
Shanklin Pier Ltd v Detel Products Ltd [1951] 2 KB 854 (refd)
The Society of Lloyds v Clementson [1995] CLC 117 (refd)
Trollope and Colls Ltd v North West Metropolitan Regional Hospital Board [1973] 2 All ER 260 (refd)
Twyman v Knowles (1853) 13 CB 222 (refd)
Vincent v Cole (1828) M&M 258 (refd)

Legislation referred to

Contracts Act 1950 s 75
Evidence Act 1950 s 106
Law of Property (Miscellaneous Provisions) Act 1989 s 2
Rules of the High Court 1980 O 14

Kee Kin San (Aziz Hon Annuar) for the plaintiff.
Tan Chik Wai (Thomas Philip, Kwa & Lou) for the defendant.

Abdul Malik Ishak J:

THE LEGAL SEMANTICS

[1] The senior assistant registrar ('SAR') allowed the plaintiff's application for summary judgment under O 14 of the Rules of the High Court 1980 ('RHC') and being aggrieved the defendant appealed to the judge in chambers as seen in encl 11. Disposal of proceedings without a trial is the fastest mode to dispose off the backlog of cases. It is a summary procedure and it applies to every action begun by writ. But this summary procedure is not suitable in the following cases:

(1) in an action by the plaintiff for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage (see O 14 r 1(2)(a) of the RHC); and

(2) in an action by the plaintiff founded on an allegation of fraud.

[2] In order to obtain summary judgment without a trial the plaintiff has to prove his claim clearly and if the defendant is unable to set up a *bona fide* defence or raise an issue which ought to be tried then the court should grant the plaintiff the summary judgment (*Roberts v Plant* [1895] 1 QB 597 (CA); *Robinson & Co v Lynes* [1894] 2 QB 577; *Dane v Mortgage Ins Corp* [1894] 1 QB 54 (CA); *Nassau Steam Press v Tyler*70 LT 376; and *Edwards v Davis* 4 TLR 385 (CA)). So, my duty in relation to encl 11 was quite simple. It was to ascertain whether the defendant has no defence or has no arguable point to be argued and once I was satisfied that that was the case, I would have to give judgment to the plaintiff. Jessel MR in *Anglo-Italian Bank v Wells; Anglo-Italian Bank v Davies* (1878) 38 LT 197 (CA) nicely puts it in this way (see pp 200 to 201 of the report):

> when the judge is satisfied not only that there is no defence, but no fairly arguable point to be argued on behalf of the defendant, it is his duty to give effect to this section, and to give judgment for the plaintiff.

[3] And according to Bramwell LJ in *Crump v Cavendish* 5 Ex D 211 (CA), the defendant 'is bound to show that he has some reasonable ground of defence to the action'. Jessel MR also said in *Anglo-Italian Bank v Wells; Anglo-Italian Bank v Davies* at p 199 of the report that O 14 'is intended to prevent a man, clearly entitled to money, from being delayed where there is no fairly arguable defence to be brought forward'.

[4] The journals are replete with authorities on O 14. The general principles that can be formulated from these varied authorities may be stated as follows:

(1) that summary judgment will not be granted when there is a *bona fide* triable issue to be determined (*Kim Seng Hotel & Coffee Shop v Chuah Teong Buan* [1971] 1 MLJ 233 (FC); and *National Co for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 (FC));

(2) that summary judgment will also not be granted where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff (*Harrison v Bottenheim* (1872) 26 WR 362 (CA)); and

(3) that summary judgment will not be granted where there are disputes that arose out of conflicting professional opinions (*European Partners in Capital (EPIC) Holdings BV v Goddard and Smith* (1992) 41 EG 118 (CA)).

[5] That would be the brief legal discourse on the law and I will revert to it later.

[6] In the meantime, it would be ideal to narrate the facts of the case. For this exercise, I shall be brief.

FACTS OF THE CASE

[7] By the letter of offer dated 28 June 1996, the plaintiff agreed to grant a term loan of RM15 million to the defendant with interest thereon calculated at the rate of 2.25% per annum above the plaintiff's base lending rate of 9% per annum (hereinafter referred to as the 'prescribed rate') on monthly rests (and such interest rate being variable at the plaintiff's sole discretion). Pursuant to the letter of offer, the defendant entered into a facility agreement dated 11 July 1995 with the plaintiff upon the terms and conditions as stated herein:

(1) by virtue of the facility agreement, it was, inter alia, a specific term and condition that the penalty interest at the rate of 1% above the prescribed rate on daily rests shall be payable by the defendant on any of the instalments or other monies covenanted to be paid out but which was not paid out;

(2) that the defendant shall be liable to pay all fees, expenses in connection with or incidental to the term loan including the plaintiff's solicitors fees on solicitor-client basis when any monies granted to the defendant shall be required to be recovered by any process of law or by the plaintiff's solicitors; and

(3) that the term loan was to be repayable by the defendant by quarterly instalments of RM937,500 per quarter commencing on the following quarter after the date of the first draw down over a period of 16 quarters or until the term loan and all interests thereon has been fully paid up.

[8] Now, the term loan was fully draw down and released by the plaintiff on 11 July 1996 to the defendant and the same has been duly informed and confirmed by the plaintiff to the defendant by letter dated 11 July 1996 wherein the modes on payment has been confirmed as well. The defendant has defaulted in the repayments of the term loan and calculation wise as at 23December 1997 the amount of the term loan together with interest due and payable to the plaintiff amounted to the sum of RM11,596,490. As a result of the defendant's failure to make the repayment to the plaintiff, the latter appointed their solicitors Messrs Choong & Co to demand the arrears of the repayment. This was accordingly done and by an AR registered letter dated 21 January 1998, the plaintiff's solicitors demanded for the repayment of the sum of RM1,283,990.86 being the arrears of the quarterly principal repayments from August 1997 to October 1997 together with interest for the months of September, October and November 1997 as well as the penalty interest. The defendant remained adamant and failed to comply with thenotice of demand. This prompted the plaintiff to instruct their solicitors M/s Choong & Co to terminate and recall the repayment of the entire loan amounting to RM11,596,490.86 as at 10 February 1998 together with interest thereon. The interest was at the rate of 2.25% per annum above the plaintiff's

base lending rate of 10.35% per annum on monthly rests as well as penalty interest at the rate of 1% per annum on daily rests on all the amounts that were in default.

[9] All these notices of demand came to nought. The defendant has failed, refused and neglected to comply with the demand and as a result of the defendant's refusal, the plaintiff proceeded to file its writ of summons and the statement of claim on 6 March 1998.

[10] The plaintiff's cause of action against the defendant was founded on the breach of contract by the defendant. At all material times, the failure on the part of the defendant to pay the repayment instalments as scheduled constituted and resulted in a breach of the facility agreement and thereby giving the plaintiff the right, at law, to institute the action.

[11] In the law of contract, rights and remedies are always inextricably intertwined. The serious failure by one party to perform like the defendant here will entitle the other party like the plaintiff here to withhold his own performance and even to the extent of terminating the contract. Thus, rescission, withholding one's performance and termination of the contract are the vested rights of the innocent party and these rights are the most effective way of remedying the breach.

THE DEFENDANT'S ARGUMENTS

[12] The defendant raised six issues and the defendant said that they were triable issues. These six so called triable issues may be stated as follows:

(1) the two conditions precedent as stated in the letter of offer were not complied with;

(2) no notice of the change of the base lending rate ('BLR') was given to the defendant;

(3) there was a wrongful recall of the facility;

(4) there was in existence a collateral agreement wherein it was agreed that an interest rate of 1.25% will be charged as opposed to 2.25% that was charged and demanded by the plaintiff;

(5) the imposition of the penalty interest contravened s 75 of the Contracts Act 1950; and

(6) since the facility was recalled shortly after being disbursed, there was no loss to the plaintiff.

[13] I will now examine these six issues in quick succession.

THE FIRST ISSUE

[14] The letter of offer dated 28 June 1996 stated two conditions precedent, namely:

(1) the board of directors by resolution authorising the acceptance and operation of the term loan facility; and

(2) the outstanding balance under the tradeline facility of RM5 million granted to Wembley Rubber Products (M) Sdn Bhd is to be fully settled prior to the draw down of the RM15 million term loan facility.

[15] It must be borne in mind that the fact that the plaintiff did not affirm an affidavit in reply in regard to the issue of compliance with the conditions precedent shall not be deemed to mean that the conditions precedent have not been complied with. At all material times, the stand of the plaintiff was that the letter dated 11 July 1996 issued by the plaintiff confirming the release of the term loan amounting to RM15 million to the defendant as seen in exh JMJ–2' of the plaintiff's supporting affidavit in encl 4 has impliedly prove that the said conditions precedent have been complied with. It must be borne in mind that the letter of offer and the facility agreement categorically specified that prior to the release and the draw down of the RM15 million term loan facility to the defendant the said conditions precedent have to be complied with. It is an implied term which has been accepted in the banking practice that the plaintiff as an established bank would only release the term loan upon compliance of the conditions precedent. On implied terms, I need to refer to the decision of the late Peh Swee Chin FCJ in the case of *Sabahumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151. There his Lordship said at pp 169 to 170 of the report:

> Implied terms are of three types. The first and most important type is an implied term which the court infers from evidence that the parties to a contract must have intended to include it in the contract though it has not been expressly set out in the contract. The implied term contended for in this appeal belongs to this type and much more about this later.
>
> The second type of implied term is one by operation of law, and not based on the inference just explained. By operation of law, I mean that a large number of specific implied terms have been held in to arise from previous decided cases on certain specific facts. Such *ratio decidendi* in respect of such decided implied terms are normally adopted by courts in subsequent cases on similar facts as a matter of course without the necessity of any court to decide afresh whether it ought to draw the inference as explained above. Thus, such implied terms come from decided cases exclusively. Thus, in a contract of employment, there is an implied term that the employee will serve his employer faithfully, and not to act against the employer's interest, and again there is another implied term that the employer will provide a safe system of work. Many of such decided and specific implied terms have been incorporated into statutes such as the Sale of Goods Act 1957 and others; it is not necessary to discuss it further except to emphasise that such an implied term of this particular type may sometimes be excluded by parties by an agreement to the contrary and more importantly, it is not dependent on the court having to draw an inference explained above.

The third kind of an implied term is one that is implied by custom or usage of any market or trade which is reasonable, and again it is not dependent on a court's inference explained above but by virtue of such a custom or usage from the market or trade. Interestingly, s 92(e) of the Evidence Act 1950 seems to be custom-made to provide logistical support for this particular type of implied term. It will be remembered that s 92(e) aforesaid is one of the exceptions to the rule against evidence to contradict or vary any terms of a written contract.

Reverting to the first type of implied term which is dependent on a court drawing an inference as explained above, there are two tests to fix the parties with such an intention, ie that the parties must have intended to include such an implied term in the contract. The first test is a subjective test, as stated by MacKinnon LJ in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 at p 227, that such a term to be implied by a court is 'something so obvious that it goes without saying, so that if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress his with a common 'Oh, of course'.

The second test is that the implied term should be of a kind that will give business efficacy to the transaction of the contract of both parties. The test was described by Lord Wright in *Luxor (Eastbourne) Ltd & Ors v Cooper* [1941] AC 108 at p 137, that in regard to an implied term, ' … it can be predicated that 'It goes without saying', some term not expressed but necessary to give the transaction such business efficacy as the parties must have intended'. Business efficacy in my opinion, simply means the desired result of the business in question. Thus, in *Shirlaw*'s case, Shirlaw who was appointed the managing director by the defendant company for 10 years, sued for and obtained damages for breach of agreement. It was held that it was an implied term that the defendant company would not alter its articles of association to create a right for itself to remove the plaintiff before the 10 year term expired. The implied term inferred by the court there was to let both parties achieve the desired result that the post of the managing director would continue to be available for 10 years to Shirlaw as both parties must have intended it at the time when making the agreement.

The testy answer to the question of the officious bystander of 'Oh, of course' spoken of by Mackinnon LJ was described equally elaborately by Scrutton LJ in *Reigate v Union Manufacturing Co (Ramsbottom) Ltd & Anor* [1918] 1 KB 592 at p 605 as ' … of course, so and so will happen, we did not trouble to say that, it is too clear'.

[16] In 1973, Lord Pearson in *Trollope and Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 2 All ER 260 at p 268, [1973] 1 WLR 601 at 609 had this to say:

An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties make for themselves.

[17] Parties may have intended to contract against the background of an established trade custom or the parties may have thought that some things were too obvious to express or the parties may not have considered every possible eventuality. So when these eventualities arise, the parties may argue that a term should be implied. The case laws do not say that the 'officious bystander' and the 'business efficacy' tests should be regarded as distinct, cumulative or dominant, one over the other. However, the Privy Council in the case of *BP Refinery (Westernport) Pty Ltd v Shire of Hastings Ltd* [1978] ALJR 20 was of the view that it should be regarded as cumulative.

[18] It was urged upon me and I must accordingly agree that the plaintiff as an established bank would only release the term loan upon compliance of the conditions precedent. According to Steyn LJ in *The Society of Lloyds v Clementson* [1995] CLC 117, at p 131, that 'terms implied in fact are individualised gap fillers, depending on the terms and circumstances of a particular contract. Terms implied in law are in reality incidents attached to standardised contractual relationships'. In the case of *Malik v BCCI* [1997] 3 All ER 1, Lord Steyn remarked at p 15 of the report:

> Such implied terms operate as default rules.

[19] Moreover, the onus of proving whether the conditions precedent have been complied with shall lie with the defendant by virtue of s 106 of the Evidence Act 1950. It was well within the knowledge of the defendant whether the conditions precedent have been complied with by the defendant bearing in mind that the defendant would have special knowledge whether their own board of directors have passed a resolution authorising the acceptance and operation of the tradeline facility and whether the defendant has fully settled the tradeline facility of RM5 million granted to Wembley Rubber Products (M) Sdn Bhd.

[20] Given the undisputed and uncontested facts as alluded to above, the main issue for determination would be whether the alleged failure on the part of the plaintiff to provide proof of any compliance with the conditions precedent amounted to a *bona fide* triable issue warranting a full trial to be held and witnesses to be called? I must answer these questions in the negative. The first issue was not a *bona fide* triable issue. The following reasons would suffice:

(1) The letter of offer dated 28 June 1996 was duly accepted by the defendant, the letter dated 11 July 1996 informing the release of the term loan was duly sent and accepted by the defendant, the facility agreement dated 11 July 1996 wherein the same has been duly entered and executed by the defendant, the certificate of indebtedness dated 26 May 1995 indicating the amount outstanding as at 23 December 1997 wherein the same has been duly prepared by the plaintiff, the letter of demand dated 21 January 1998 demanding the arrears of

instalment was duly sent and accepted by the defendant, the letter of demand cum termination dated 23 December 1997 demanding the entire term loan owing wherein the same has been duly sent and accepted by the defendant, and finally, the statement of account and the admission letter on the part of the defendant dated 21 October 1997 and 14 October 1997 respectively wherein the admission letter of the defendant relate to the penalty charges and the instalment repayment were the relevant undisputed and contemporary documents that assisted the plaintiff to prove its case.

(2) All the aforesaid documents in particular the letter of offer and the facility agreement formed an absolute prima facie evidence of the existing contractual relationship between the plaintiff and the defendant as well as the terms and conditions governing the contractual relationship. These two documents legally confirmed that the defendant had entered into a valid and enforceable contract and that the plaintiff had agreed to give the term loan for the amount of RM15 million and the same has been accepted by the defendant subject to the agreed terms and conditions that have been agreed upon. These two pertinent documents have never been disputed nor have they been denied by the defendant in its statement of defence or in its affidavit in reply in encl 10.

(3) The certificate of indebtedness dated 26 May 1998 indicating the amount outstanding as at 23 December 1997 wherein the same has been duly prepared by the plaintiff in accordance with the term loan facility constituted an absolute prima facie evidence of the amount outstanding under the term loan facility payable by the defendant to the plaintiff. The certificate of indebtedness has never been disputed nor has it been denied by the defendant in the defendant's statement of defence or in the defendant's affidavit in reply in encl 10.

(4) The statement of account and the two admission letters issued by the defendant dated 21 October 1997 and 14 October 1997 constituted absolute prima facie evidence of the contractual liability to pay by the defendant to the plaintiff. These pertinent documents have not been disputed by the defendant nor have these documents been denied by the defendant in its statement of defence or in the defendant's affidavit in reply in encl 10.

[21] Without a doubt, the documentary evidence assisted the plaintiff in proving its case. When human memory fails, documentary evidence would be the best evidence. Indeed the imperfection of the human memory can never be doubted. It is always ideal to produce the primary documentary evidence

of a transaction. The document itself must be produced in order to prove the terms of the contract. Lord Tenterden in *Vincent v Cole* (1828) M & M 258 aptly said:

> I have always acted most strictly on the rule, that what is in writing shall only be proved by the writing itself. My experience has taught me the extreme danger of relying on the recollection of witnesses, however honest, as to the contents of a written instrument; they may be so easily mistaken that I think the purposes of justice require the strict enforcement of the rule.

[22] Here, all the documents produced by the plaintiff strongly and firmly proved the contractual liability on the part of the defendant to pay the outstanding debt to the plaintiff. The defendant too did not dispute these documents nor denied the existence of these documents. The defendant saw it fit not to challenge the legality of these documents nor raised defences in order to dispute the documents in its statement of defence and in its affidavit. All these must be construed adversely against the defendant (*Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 (CA); *Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee)* [1998] 4 MLJ 651 (CA); *Perbadanan Pembangunan Ekonomi Sarawak v Sarawak Motor Industries Bhd* [1989] 3 MLJ 246 (HC); and *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 (SC).

[23] I venture to say that even if it was argued that the conditions precedent were not complied with yet it must be borne in mind that such non-compliance would not give rise to a triable issue and that the facility agreement would still stand for the following salient reasons:

(a) that by virtue of s 5.02 of the facility agreement, the plaintiff had an upper hand in that it gave an absolute right and discretion to the plaintiff to modify and/or to waive the conditions precedent.

[24] A submission was advanced on behalf of the defendant to the effect that since the plaintiff has failed to reply to the averments made by the defendant pertaining to the non-compliance of the conditions precedent, such failure must be construed to be an admission. Although this submission appeared to be attractive yet it cannot affect the standing of the plaintiff. I was of the considered view that such failure shall not be deemed to be an admission for the following reasons: that the assertion by the defendant was not a positive assertion upon the material issue and it failed to condescend to particulars. It was just a bare defence and there was a total absence of details to support the averment made nor was there a reasonable ground for such an averment to be made. Consequently, as the night follow the day, the first issue must be put into oblivion (*Perbadanan Pembangunan Ekonomi Sarawak v Sarawak Motor Industries Bhd*; and *Bank Negara Malaysia v Mohd Ismail & Ors*).

THE SECOND ISSUE

[25] To say as was said by the defendant that there was no notice to show the change of the BLR and that such change was unconscionable, without more, would not be doing justice to the plaintiff. The crucial question to pose would be whether the second issue constituted *a bona fide* triable issue. Without hesitation, I must categorically answer this question in the negative for the following reasons:

(1) Section 6.03 of the facility agreement imposed no contractual obligation on the part of the plaintiff to inform the defendant of the changes of the BLR.

(2) The defendant's allegation that the plaintiff has changed the BLR according to the whims and fancies of the plaintiff was a mere bare allegation bearing in mind that it was an implied term to the facility agreement that the changes of the BLR was determined solely by the Central Bank of Malaysia — popularly known as the Bank Negara Malaysia ('BNM'). BNM has shown itself to be transparent. It has made available to members of the public through the newspapers in regard to the changes in the rate of the BLR. It would be against business efficacy to impose a duty of care onto the plaintiff as a bank to inform its clients as to the changes of the BLR since changes in the BLR happen on a daily basis. Moreover, the defendant knew about the changes of the BLR because it was clearly stated in the loan statement issued by the plaintiff. Despite this knowledge, the defendant remained silent and did not raise this issue prior to the legal proceeding instituted by the plaintiff. I must reject, outright, the second issue (*Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 (FC)).

THE THIRD ISSUE

[26] Was there really a wrongful recall of the loan facility as alleged by the defendant and, if so, would it constitute a *bona fide* triable issue? I would, for the following reasons, answer these two questions in the negative:

(1) the recall of the loan facility was done rightly in accordance to art 12 of the facility agreement and the undisputed evidence such as exhs 'JMJ–4' and 'JMJ–5' annexed to the plaintiff's supporting affidavit have been produced by the plaintiff to categorically show that the recall of the loan facility was rightly done; and

(2) it was a mere bare allegation on the part of the defendant to allege that the loan facility was wrongly recalled bearing in

mind that such an allegation was inconsistent with the undisputed contemporary documents marked as exhs 'JMJ–3', 'JMJ–4' and 'JMJ–5' annexed to the plaintiff's supporting affidavit.

[27] Here, the plaintiff has complied with the 'best evidence rule'. The plaintiff has produced the best evidence available in its arsenal. Such documentary evidence speaks volume and it would certainly reduce the risks of fraud, mistake and inaccuracy. The value of documentary evidence can never be doubted. It has always been held in high esteem by judges the world over. In *Augustien v Challis* (1847) 1 Exch 279, an action against a sheriff was instituted wherein the sheriff was alleged to have negligently withdrawn a writ of fi fa. The defence of the sheriff was that a claim of the debtor's landlord in respect of rent due had priority over the plaintiff's claim. The landlord gave evidence that the rent was payable under the lease. The court held that such evidence emanating from the landlord was inadmissible on the grounds that the amount of rent due could not be proved without producing the original of the lease. In the same vein, reference should also be made to the case of *Twyman v Knowles* (1853) 13 CB 222.

[28] For these reasons, I must accordingly reject the third issue.

THE FOURTH ISSUE

[29] I must rule that the fourth issue was not a *bona fide* triable issue that would warrant this case to proceed to full trial. The following reasons would suffice:

(1) It was an outright bare assertion to say that there was in existence a collateral agreement pertaining to the rate of interest at 1.25% that would be charged as opposed to the interest of 2.25% that was charged and demanded. It was an assertion that lacked precision or was inconsistent with the undisputed contemporary documents marked as exhs 'JMJ–1', 'JMJ–2', 'JMJ–3', 'JMJ–4', 'JMJ–5' and 'JMJ–7' that were annexed to the plaintiff's supporting affidavit. I must say that the defendant has failed to make a positive assertion in order to support its defence. It is trite law that when the defence of collateral agreement was relied upon, the onus would lie on the person who relied on it by showing details of the existence of such an agreement. In the context of the present case, the onus would squarely fall on the shoulders of the defendant by proving the following particulars:

   (a) as to when the collateral agreement was made;

   (b) as to the nature of the collateral agreement;

   (c) as to the names of the parties that were involved in the collateral agreement;

(d) as to the venue where the collateral agreement was arrived at; and, finally,

(e) as to the details of the collateral agreement that has been relied upon.

But, unfortunately, the defendant failed to allude to all these salient details in its affidavits.

(2) It was quite apparent that the stand of the plaintiff was that it had never entered into any collateral agreement with the defendant because such an agreement would not be an advantage to the plaintiff at all.

(3) The defendant must be estopped from raising the fourth issue because the defendant has accepted and admitted to the interest imposed by the plaintiff. The consent on the part of the defendant to enter into the facility agreement (exh 'JMJ-1' annexed to the plaintiff's supporting affidavit) and the receipt of the letter of offer (exh 'JMJ–3' annexed to the plaintiff's supporting affidavit) which expressly showed the rate of interest to be charged clearly tied the hands of the defendant in that the defendant must be bound by it. Moreover, the defendant had, despite receiving the monthly statement from the plaintiff, never at any material time raised the issue of wrongful computation of the interest rate. Nor did the defendant ever raise about the existence of the collateral agreement. In addition to that, the defendant had never at any material time raised the issue pertaining to the different interest rate despite demands for payment by the plaintiff (exhs 'JMJ–4' and 'JMJ–5' annexed to the plaintiff's supporting affidavit). It must be borne in mind that correspondences between the parties showed that the defendant had admitted to the rate of interest that was imposed by the plaintiff. I must categorically say that the defence of collateral agreement was only raised, for the very first time, when the plaintiff commenced the legal proceeding against the defendant

(*Perwira Habib Bank Malaysia Bhd v Lim Hong Tatt* [1989] 1 MLJ 263; *National Bank of Greece SA v Pinios Shipping Co (No 1) & Anor; The Maira* [1990] 1 All ER 78 (HL); *The Pacific Bank Bhd v Chong Wai Hiong* [1989] 2 CLJ 509; *Interfinance Bhd v Liew Ek Chiu* [1993] 2 CLJ 644; and *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd*).

[30] What is a collateral agreement? One may ask this question. It involves an exposition of the law. Now, although a statement is not part of the main contract yet it is part of a collateral contract and the court may hold it as such, according to the facts of each particular case. That statement may found an action for breach of contract and it is collateral to the main contract. A classic example would be the case of *Heilbut, Symons & Co v Buckleton* [1913] AC 30. There, Lord Moulton aptly stated at p 47:

> It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. 'If you will make such and such a contract I will give you one hundred pounds', is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract.

[31] Over the years, the collateral contract has proved to be a useful device in that the court will find the statement in question to be a term of the main contract. The collateral contract provides a means of avoiding the rule as to the privity of contract. It too would circumvent the parol evidence rule in that it 'eases the consciences of those who believe that the parol evidence rule is a strict and meaningful prohibition'. In *City and Westminster Properties Ltd v Mudd* [1959] Ch 129, the court held that the collateral contract had the legal effect of rendering the statement which contradicted the main contract by rendering it unenforceable a right of one of the parties under the main contract. The facts in Mudd's case may be stated as follows. Mr Mudd leased a shop from the plaintiff and Mr Mudd also lived on the premises. When the time came for the renewal of the lease the plaintiff wished to include a new term stating that the premises were only to be used for business purposes. Mr Mudd made it clear that he wished to go on residing on the premises and that he would not accept the new term. Mr Mudd accepted the new lease, with the new term, only after the plaintiff stated that if he signed the lease no objection would be made to his continuing to live on the premises. Had Mr Mudd not thought that he would be able to continue to live on the premises he would not have signed the new lease but moved to other premises which were available at the time. The plaintiff sought to forfeit Mr Mudd's lease on the basis that he was in breach of its terms by residing on the premises. Harman J who heard the case dismissed the action for forfeiture and his Lordship remarked that (see pp 145 to 146 of the report):

> There was a clear contract acted upon by the defendant to his detriment and from which the plaintiff could not be allowed to resile.

[32] In short, Harman J held that there was a collateral contract that if MrMudd entered into the new lease the plaintiff would not object to his continued residence on the premises.

[33] The case of *Record v Bell* [1991] 1 WLR 853 is a fairly new case. In that case, the collateral contract was used as a device to avoid a formality agreement. There a warranty as to the vendor's title to the land for sale was found to be part of a collateral contract. Consequently, it did not prevent the main sale contract from being effective because of the requirement that contracts for the sale of land should be in writing as exemplified by s 2 of the Law of Property (Miscellaneous Provisions) Act 1989.

[34] As I see it, two requirements must be fulfilled in order to establish the existence of a valid and binding collateral contract:

(1) the representor must have intended that the promise to be legally binding; and

(2) the representee must have entered into the main contract on the basis of the statement and in reliance on that statement.

[35] In my considered view, if these two requirements are met, then the courts may hold that a collateral contract has come into existence and the courts too may enforce the contract not as part and parcel of the main contract but rather as a separate collateral contract.

[36] In order to prove the existence of a collateral contract, all the essential elements of a valid contract must be present. So, in order to constitute a collateral contract, there must be an agreement, consideration and an intention to be legally bound. Of course, in order to establish the existence of an agreement, the plaintiff must show that a firm promise has been made and that the promise has been accepted in accordance with its terms. The critical factor to emphasise is this: that the statement must have been promissory and not merely representational. It must be borne in mind that a mere statement of opinion does not constitute a promise and it cannot therefore form the basis of an agreement (*JJ Savage & Sons Pty Ltd v Blakeney* (1970) 119 CLR 435).

[37] In regard to the requirement of consideration, I have this to say. Just like all the other contracts, a collateral contract must also be supported by consideration. A classic example of consideration to found a collateral contract is the very fact of entering into the main contract. Thus, the words, 'if you promise me this, I will enter into the main contract with you' may trigger the existence of an collateral contract, depending on the facts of the case, because it satisfies the general requirement that consideration must be something of value paid by the promisee to the promisor in exchange for the promisor's promise. For this exercise, two authorities must be cited:

(1) *Shanklin Pier Ltd v Detel Products Ltd* [1951] 2 KB 854; and

(2) *Charnock v Liverpool Corp* [1968] 1 WLR 1498.

[38] In respect of the requirement of an intention to be legally bound, I have this to say. As it is like all other contracts, a promise will not be enforceable unless the parties intended it to be enforceable. One must be objective in order to determine the existence of an intention. Thus, one must look objectively at the facts and circumstances surrounding the promise. If it is crystal clear that the parties intended the promise to be binding then it will be binding even though it is not incorporated into the main contract. If that happens then the promise will constitute a collateral contract in its own right (*J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 2 All ER 930). But, a caveat must be placed in that the promise must be consistent with the main

contract. In other words, an alleged collateral contract cannot be inconsistent with the terms of the main contract. There is a clear justification for this. It is this. That contracts co-exist and are equally enforceable. On very rare occasions have collateral contracts been found to exist even though they are inconsistent with the express terms of the main contract (*City and Westminster Properties Ltd v Mudd*).

[39] What is the effect of a breach of a collateral contract? The remedy lies in damages and that specific performance of the main contract cannot be awarded. Neither can the innocent party repudiate the main contract because it has not been breached. In determining the quantum of damages, it would usually be the amount which is equivalent to the diminished value of the main contract.

[40] All these expositions of the law in regard to the collateral agreements serve as useful guidelines and cannot be said to be exhaustive. Unfortunately, in the context of adjudicating encl 11, they are of no utility at all. There was, as I explained earlier, no collateral agreement pertaining to the rate of interest.

THE FIFTH ISSUE

[41] Was the imposition of the penalty interest constituted a *bona fide* triable issue? The answer was in the negative. It was not a *bona fide* triable issue and it did not warrant a full trial for the following reasons:

(1) The right of the plaintiff to impose a penalty interest on the defendant is an absolute contractual right pursuant to article 6.04 of the facility agreement that has been duly entered into by the defendant. The defendant is contractually bound to honour the said term and it must be estopped from denying the same (*Perwira Habib Bank Malaysia Bhd v Lim Hong Tatt*); *National Bank of Greece SA v Pinios Shipping Co (No 1) and another The Maira*; *The Pacific Bank Berhad v Chong Wai Hiong; Interfinance Bhd v Liew Ek Chiu*; and *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd*).

(2) Depending on the circumstances of the case, the penalty interest may or may not be a penalty. Here, the plaintiff was only claiming the penalty interest at the rate of 1% per annum. Itwas not exhorbitant and it was not caught by s 75 of the Contracts Act 1950. As a licensed bank, the plaintiff was entitled to impose the penalty interest (*Realvest Properties Sdn Bhd v Co-operative Central Bank Bhd (In receivership)* [1996] 2 MLJ 461 (FC)).

THE SIXTH ISSUE

[42] This was not a *bona fide* triable issue. The recall of the facility was rightly done in accordance with art 12 of the facility agreement. The plaintiff has

produced documents at exhs 'JMJ–4' and 'JMJ–5' annexed to the plaintiff's supporting affidavit. These constituted undisputed evidence that the recall of the loan facility was rightly done. The very fact that the loan facility has been released and draw down by the defendant on 11 July 1996 and the recall was made on 10.2.1998 constituted proof that the plaintiff had suffered losses and the certificate of indebtedness dated 26 May 1998 stood as prima facie proof as to the amount of losses suffered by the plaintiff. Consequently, it was wrong to say that the plaintiff had not suffered any loss because of the recall of the loan facility.

CONCLUSION

[43] For the reasons as adumbrated above, I dismissed the defendant's appeal in encl 11 with costs. I too made an ancillary order that this file — being a pre-2000 matter, should be closed forthwith. I did just that.

Defendant's appeal dismissed with costs.

Reported by Peter Ling